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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

BILL JONES, SECRETARY OF STATE OF CALIFORNIA

Petitioner,

v.

TOM BATES, ET AL

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI (OR WRITS OF PROHIBITION AND MANDAMUS) TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY TO RESPONDENTS' COMBINED OPPOSITION BOTH TO THE PETITION FOR A WRIT OF CERTIORARI (OR FOR WRITS OF PROHIBITION AND MANDAMUS) AND TO THE MOTION TO EXPEDITE BRIEFING AND CONSIDERATION OF THAT PETITION

EINER ELHAUGE
Counsel of Record
Harvard Law School
1575 Massachusetts Ave.
Cambridge, MA 02138
Tel: (617) 496-0860
Fax: (617) 496-0861

JAMES F. SWEENEY, Chief Counsel
Secretary of State of California
1500 11th Street, Sixth Floor
Sacramento, CA 95814
Tel: (916) 657-2601

THOMAS S. KNOX
PETER D. LEMMON
Knox, Lemmon & Anapolsky, LLP
One Capitol Mall, Suite 700
Sacramento, CA 95184
Tel: (916) 231-9911

WILLIAM BENTLEY BALL
Ball, Skelly, Murren & Connell
Harrisburg, PA

HON. WILLIAM P. CLARK
Clark, Cali & Negranti
Paso Robles, CA

Attorneys for Petitioner Secretary of State

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REPLY TO OPPOSITION TO MOTION AND PETITION

Although entitled an opposition to the motion to expedite, respondents' opposition explicitly states that they intend to file no separate opposition to the petition and instead asks this Court to deny the petition based on the papers before it. *See* Opp. at 9. Moreover, virtually all the arguments in the opposition are about why the petition should be denied rather than about why consideration of that question should not be expedited. *See* Opp. at 1-9. Indeed, respondents ask for an expedited denial. *See* Opp. at 1. Their filing must thus be regarded as a combined opposition to the petition as well to the motion to expedite, and petitioner files the following reply.

Respondents make many false assertions in their combined opposition to the motion and petition that must be corrected.

1. Respondents falsely assert that this Court either never takes cases before judgment, Opp. 1, or only in cases of national emergency, Opp. 6. Both assertions are wrong. U.S SUPREME COURT RULE 11 sets the standard for granting certiorari before judgment, and it does not require a national emergency. Rather, it permits the granting of a writ of certiorari before judgment upon a showing that the case is of "imperative public importance" and "require[s] immediate determination in this Court." Nor has this Court made a practice of requiring a national emergency. In *Williams v. Rhodes*, 89 S. Ct. 1, 2 (1968), the Supreme Court took jurisdiction before judgment in a case that -- like here -- involved the question of whom a particular state would allow on the ballot. *Williams v. Rhodes*, 393 U.S. 23 (1968). In *Railroad Retirement Bd. v. Alton R. Co.*, 295 U.S. 330 (1935), the Supreme Court granted certiorari before judgment in a case about whether railroads had to provide pensions to their employees. In *Rickert Rice Mills v. Fontenot*, 297 U.S. 110 (1936), the Supreme Court granted certiorari before judgment to consider whether the Internal Revenue Service could collect certain agricultural taxes. These are important matters, but not national emergencies, nor any

more important than the question of the identity of the entire slate of legislative candidates in California.

2. Respondents falsely assert that the Ninth Circuit's extraordinary order rounding up additional intervenors on appeal was required because the Secretary's letter stated he would only apply a Ninth Circuit decision to the named parties. *Id.* at 2-3, 6-7. While leading federal courts authorities certainly state that declaratory judgments do not bind the State as applied to nonparties, *see, e.g.*, Shapiro, *State Courts and Federal Declaratory Judgments*, 74 NW. U.L. REV. 759 (1979), the letter nowhere states that the Secretary would apply a Ninth Circuit decision only to named parties. What the letter points out is that -- because the California Supreme Court has upheld the same term limits against the same challenge -- an affirmance would create a conflict between the California Supreme Court and the Ninth Circuit requiring review in this Court. *See* Petition App. 53a. This conflict would exist *no matter what the Secretary did in the event of a Ninth Circuit affirmance.* If he applied a Ninth Circuit affirmance, he could be enjoined in state court; if he applied the California Supreme Court decision, he could be enjoined in federal district court. Petition at 19-20. Thus, the letter nowhere indicates whether the Secretary would follow the Ninth Circuit or the California Supreme Court in the event of a conflict because the point is not the Secretary's intentions but the fact of what such a conflict would mean. Moreover, while the conflict would immediately exist only as to nonparties, it will quickly be created for parties too because opponents aggrieved by running *against* parties who are termed-out are equally likely to go to state court to get an injunction against those parties running. Pet. 20. Respondents continue to fail to understand that it is the conflict between co-equal court systems -- not a conflict between the Ninth Circuit and the Secretary -- that creates the electoral confusion.

3. Respondents falsely claim there will be no real conflict because the California courts would conclude that this Court has changed the relevant doctrine since the California Supreme Court decided *Legislature v. Eu*, 54 Cal. 3d 492 (1991), *cert. denied*, 503 U.S. 919 (1992), which relied on this Court's decision in *Anderson v. Celebrezze*, 460 U.S. 780 (1983). Opp. at 3-4. But, if anything, the clarifications provided by this Court's subsequent First and Fourteenth Amendment doctrine are decidedly *less* favorable to plaintiffs than *Anderson*. In particular, *Burdick v. Takushi*, 504 U.S. 428 (1992), on which plaintiffs rely for the proposition that the doctrine has changed since *Anderson*, now makes clear that: (1) strict scrutiny applies only if the restriction is unreasonable and discriminatory, *id.* at 434; *see also Timmons v. Twin Cities Area New Party*, 117 S.Ct. 1364, 1369 (1997), (2) no balancing test or less restrictive alternative analysis applies unless the burden on voters is unreasonable and discriminatory, *Burdick*, 504 U.S. at 434, 440 n.10; *see also Timmons*, 117 S. Ct. at 1373; (3) a severe burden does not exist if voters cannot vote for, or find on the ballot, particular candidates (as opposed to candidates having particular views), *Burdick*, 504 U.S. at 433, 440 n.10; *Timmons*, 117 S. Ct. at 1369-70; and (4) courts cannot second-guess the state's empirical premises unless strict scrutiny applies, *Burdick*, 504 U.S. at 439-440 & n.10; *see also Munro v. Socialist Workers Party*, 479 U.S. 189, 194-95 (1986); *Timmons*, 117 S. Ct. at 1372. Respondents identify no way in which the standard under *Burdick* and subsequent cases could possibly be said to be more favorable to their claim than *Anderson*. Nor do they square their claim that the California courts would now reverse their term limits ruling because *Burdick* changed the law with the fact that every court outside the Ninth Circuit to consider the issue after *Burdick* has found no such change but rather sustained term limits on state officials. *See* Petition at 6 n.4.

The notion that the California courts would conclude that Justice Stevens' opinion in *U.S.*

Term Limits v. Thornton, 514 U.S. 779 (1995), somehow overruled Justice Stevens' opinion in *Anderson* is even more ludicrous. No other court to consider the issue after *Thornton* has reached such a bizarre conclusion, Petition at 6 n.4, including even the district court below, which agreed that *Thornton* "is largely inapposite." *Bates v. Jones,* 904 F. Supp. 1080, 1096 (N.D. Cal. 1995). This is not surprising. *Thornton* nowhere applied the First and Fourteenth Amendment doctrines, and denied certiorari on that issue. Rather, *Thornton* interpreted the Qualifications Clauses to prohibit *any* additional qualifications for *federal* legislators, relying on an interpretation that stretched back to *Powell v. McCormack*, 395 U.S. 486 (1969).[1] This absolutist interpretation of the Qualifications Clauses thus preceded *Anderson* and *Legislature v. Eu,* and the principle that states *can* add qualifications that restrict choices for *state* officials has co-existed throughout this period under not just *Anderson* and *Burdick* but also *Moore v. McCartney*, 425 U.S. 946 (1976) (sustaining term limits on state official), and *Gregory v. Ashcroft*, 501 U.S. 452 (1991) (sustaining age limit that prevented voters from retaining judges who exceeded limit). Indeed, respondents' proposition that *Thornton* now strikes down any qualification for state office that prevents voters from voting for whomever they please would stand established doctrine on its head, for established doctrine requires special deference to -- not blanket hostility to -- qualifications for state officials. *See, e.g., Gregory*, 501 U.S. at 460-63. *See also* LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 1098 (1988) ("candidate eligibility requirements . . . are generally . . . sustained so long as they rationally relate to a legitimate state interest."). Even if *Thornton* meant to overturn all these cases in dicta, and indicate that all

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[1] *Thornton* and *Powell* also derived their absolutist principle from framer statements about the original Constitution, which are irrelevant to the meaning of the First and Fourteenth Amendment. Indeed, the Fourteenth Amendment on its face *includes* a qualification for state office, *see* U.S. CONST. Amend. XIV, §3, and nothing in its legislative history or subsequent case interpretation remotely suggests a ban on all qualifications for state office.

qualifications restricting voter choice for state officials are now impermissible, that dicta would have been in turn overturned by dicta in *Timmons*, 117 S. Ct. at 1369-70. But there is no reason to think *Thornton* meant to say anything of the sort because it specifically *disclaimed* any such implication. 514 U.S. at 837. *See also id.* at 845 (Kennedy, J. concurring) (stressing that the issue was not the efficacy of term limits but the intrusion of states on a federal domain).[2]

4. Respondents misleadingly imply that the petition for certiorari is based solely on the predicted conflict. Opp. 1-5. Although it is indeed rare to have an appellate court so clearly indicate how it intends to rule before issuing an opinion, and also rare for a lower federal court to show so little comity that it strikes down a law the state court sustained against an identical challenge, this predicted conflict is hardly the sole basis for the petition.[3] The petition is based on the combination of the "[1] exigent circumstances created by the election calendar, [2] the uncertainty inflicted by a district court judgment that casts doubt on all California legislative races, [3] the electoral confusion that would result from an imminent conflict between the state and federal courts about the constitutionality of California's legislative term limits, and [4] the extraordinary effective assertion of appellate jurisdiction over a state court by the Ninth Circuit." *See* Motion to Expedite at 4.

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[2]Respondents also vaguely intimate that there are special factual findings that distinguish the term limits here from other term limits. Opp. 2. But in fact everything the district court said about the term limits here could equally be said of permanent term limits on governors, local officials, or anyone else, Pet. App. 6a-47a. Respondent's posited distinction between consecutive and permanent term limits is not only inadministrable but unsound in principle since consecutive term limits could equally be said to "discriminate" permanently against the class of voters who want to vote for recently experienced legislators. In any event, even if attention were restricted just to permanent legislative term limits, the district court's ruling would *still* conflict with every court outside the Ninth Circuit to consider the issue. *See* Petition at 6 & n.4.

[3]It is worth noting though that respondents do not contest the fact that there would be no point to the Ninth Circuit's extraordinary order seeking to round up intervenors on appeal and free them from *Legislature v. Eu* unless the Ninth Circuit intended to strike down term limits.

Respondents do not contest the truth of the first two points, and those two points alone justify granting the petition now to *assure* the People of California that they will have a definitive resolution of this question in time for an orderly election that does not deter challengers. No matter how well intentioned the Ninth Circuit might be, it simply lacks the power to provide such assurance, and the risk of electoral chaos in the event of a federal-state conflict is too serious to responsibly ignore. Nor do respondents contest the State's explanation of why waiting to apply for a stay from this Court is not an adequate alternative for the electorate. Petition at 20-23.

5. Respondents falsely assert (without citing any authority) that the general proposition that state courts are not bound by lower federal court rulings is somehow inapplicable when a federal court strikes down a state statute. Opp. 5. In fact, state courts routinely rule that they are not bound by lower federal court decisions striking down state statutes. *See, e.g., In the Matter of The Personal Restraint Petition of Grisby,* 121 Wash.2d 419, 425-431 (1993); *In the Matter of the Application For Relief,* 80 Wash.App. 439, 448 & n.5 (1996); *Olvera v. State of Texas*, 725 S.W.2d 400, 404 (Tex.App. 1987); *Roche v. State of Florida,* 462 So.2d 1096, 1099 (1985); *People v. Lubie,* 334 N.Y.S.2d 497, 500-501 (N.Y. Crim. Ct. 1972). After all, if anything the state interest in an independent adjudication by a state court is even stronger in cases where a lower federal court has invalidated an entire state statute, let alone (as here) several clauses in the State's very constitution. Moreover, while principles of comity would ordinarily suggest that a state court should honor a lower federal court decision by treating it as persuasive authority, clearly the California courts would not do so when they are *authoritatively bound* by a contrary California Supreme Court decision. Nor (if it reaches that level) would the California Supreme Court reverse itself in order to honor the ruling of a lower federal court that not only refused to honor the state court's decision but affirmatively

endeavored to undermine its effect through an order seeking to round up intervenors on appeal. Comity does not turn the other cheek.

6. Respondents falsely assert that the relief petitioner requests is "unprecedented." Opp. 6. In fact, while rare, certiorari before judgment has been granted many times and is provided for by the rules. On the other hand, this case does involve something that is actually unprecedented as well as not provided for by any rule: the Ninth Circuit's *sua sponte* order rounding up additional intervenors on appeal and advising them to argue that an exception to res judicata frees them from a prior state court decision. After reviewing every case where a federal court allowed intervention on appeal, we cannot find *any* case that has ever solicited appellate intervention *sua sponte*.[4] Evidently, respondents have not either, for they cite none. Any *sua sponte* order inviting appellate intervention is thus, quite literally, without precedent in legal history. And certainly no lower federal court has ever done so to assure additional parties are covered by its ruling rather than a conflicting state court decision, let alone *sua sponte* advised persons who were actual parties to the state court decision to come to federal court to argue they should be excepted from the res judicata effect of the state court ruling.

7. Respondents assert that no harm will come if this Court waits until later to correct the Ninth Circuit's extraordinary order inviting these additional intervenors. But they offer no rebuttal to the point that the Ninth Circuit's order effectively exercises appellate review over the state supreme court, nor any rebuttal to the explanation of why the mere exercise of such appellate review constitutes an affront to federalism and the dignity of state courts, usurps this Court's jurisdiction,

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[4]The closest thing is a case where the invitation to intervene was not really on the court's own initiative but mandated by a statute requiring notification of the United States when the constitutionality of a federal statute was drawn into question. *Thatcher v. Tennessee Gas Trans.*, 180 F.2d 644, 648 n.7 (5th Cir.1950).

and compromises the integrity of the judicial system. Petition at 11, 23-28. Nor do they contest that the mere addition of these incumbents and former legislators as intervenors will scare off many challengers -- the very effect term limits seek to avoid. *Id.* at 27-28. Deviating from the normal appellate practice of waiting for an appellate ruling seems especially appropriate where, as here, the appeals court has deviated from normal appellate practice itself in a way that is not only strange but unprecedented in legal history.

8. Finally, respondents offer *no explanation at all* why this Court should not issue at least the writs of prohibition and mandamus. These writs have repeatedly been issued in cases that involve no national emergency but rather -- like here -- a lower court effectively exceeding its jurisdiction in some unusual way. Petition at 29-30 (collecting cases). These writs have been found especially appropriate where the lower court effectively interferes with Supreme Court jurisdiction, *id.* at 28-29, infringes on the dignity of state courts or sovereign actors, *id.* at 29-30, *or* lacks established authority for its exercise of a novel power, *id.* at 30. Any *one* of those three factors would suffice to grant the writs. All three factors are present here.

CONCLUSION

Respondents do not actually offer *any* reason to oppose the motion to expedite consideration of the petition. What they oppose is the petition itself. Indeed, they ask for an expedited denial. *See* Opp. at 1. The motion for expedited consideration of the petition should thus be granted.

Nor do respondents give *any* reason at all not to grant the petition for writs of prohibition and mandamus. Thus, even if this Court were to deny (or defer consideration of) the petition for certiorari, the Court should (in the alternative or the interim) grant the petition for writs of prohibition and mandamus.

In opposing the petition for certiorari before judgment, respondents assert that the Secretary is somehow trying improperly and desperately to "avoid" a losing appeal. Opp. 8. To the contrary, a successful petition for certiorari would not "avoid" anything -- it would mean that the State has given up its right to appeal the district court's judgment not only to the Ninth Circuit panel, but to an en banc panel of the Ninth Circuit. If the State had succeeded at that level, it would almost certainly have meant no review in this Court because then the Ninth Circuit would no longer have been in conflict with any other court -- every one of which has (outside the Ninth Circuit) sustained term limits under the First and Fourteenth Amendment. *See* Petition at 6 & n.4. The State obviously would never give up this legal right to "two bites at the apple" if this case did not really involve a matter of real exigency, detrimental uncertainty, and serious risk of electoral chaos that makes it imperative to move this case now to the only court -- this Court -- that can assure a quick and definitive resolution of the matter. The mere fact that the State is willing to forgo such an important right to get that quick, definitive resolution is a bond of the seriousness of the situation.

Indeed, it should be in everyone's interests -- including respondents -- to have this matter resolved quickly and definitively, so that the next elections may proceed without judicial conflict on the basic rules and so that -- whichever side is right on the constitutional merits -- we can all make sure that the constitutional rights of the citizens of California are fully vindicated in time for the next election. In opposing, respondents apparently hope instead that the Ninth Circuit will decide this case in time to govern the next election but not so soon as to allow this Court to hear the case and reverse before candidates have filed for the 1998 elections. This is not an aim this Court should foster. What is at stake is nothing less than who will run California for terms covering the next 2-4 years, and that is an issue that should be resolved by this Court, rather than left to the vagaries of a fight for control

over that issue between the Ninth Circuit and the California courts.

Respectfully Submitted,

EINER ELHAUGE, *Counsel of Record*

JAMES F. SWEENEY
THOMAS S. KNOX
PETER D. LEMMON
WILLIAM BENTLEY BALL
HON. WILLIAM P. CLARK

Attorneys for Petitioner Secretary of State

September 23, 1997